SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

DISTRICT OF COLUMBIA	:	Case Number: 2016 CA 6471 B
v.	:	Judge: Florence Y. Pan
LUMEN EIGHT MEDIA GROUP LLC, et al.	:	

ORDER

This case is before the Court on the parties' dueling Motions for Summary Judgment. Plaintiff District of Columbia ("the District") filed its Motion for Summary Judgment ("Pl. Mot.") on May 31, 2019; defendant Lumen Eight Media Group, LLC ("Lumen Eight") filed an Opposition to the District's Motion for Summary Judgment ("Def. Opp.") on July 3, 2019; and the District filed a Reply ("Pl. Reply") on August 1, 2019. Lumen Eight filed its Motion for Summary Judgment ("Def. Mot.") on May 31, 2019; [1] the District filed an Opposition to Lumen Eight's Motion for Summary Judgment ("Pl. Opp.") on July 3, 2019; and Lumen Eight filed a Reply ("Def. Reply") on August 1, 2019. The Court held a hearing on the motions on October 28, 2019. For the following reasons, the District's Motion for Summary judgment is granted, and Lumen Eight's Motion for Summary Judgment is denied.

FACTUAL BACKGROUND

Between 2014 and 2016, Lumen Eight[2] began executing a plan to install 43 digital, light-emitting diode ("LED") signs at 17 locations in the District of Columbia. Def. SUMF ¶¶ 77-106,

---

[1] On June 1, 2019, the other remaining defendants joined in Lumen Eight's Motion. *See* Defs. Praecipe to Join in Lumen Eight's Mot. for Summ. J. (June 1, 2019) (filed by defendants Western Washington (DC) Corporate Center, LLC; Douglas Development, Corp.; CLPF-CC Pavilion, LP; Jemal's Darth Vadar, LLC; and NH Street Partners Holdings, LLC).

[2] Lumen Eight was formerly known as Digi Media Communications, LLC. *See* Def. Statement of Undisputed Material Facts ("Def. SUMF") ¶¶ 81, 104. Digi Outdoor Media, Inc. ("DOMI"), is a predecessor entity that also is an owner of Lumen Eight. *See id.* DOMI undertook the work to implement the sign-construction plan in

109-112, 131. Lumen Eight did not obtain sign permits from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for its signs. *See* Pl. Statement of Undisputed Material Fact ("Pl. SUMF") ¶¶ 78-79; Def. Response to Pl. Statement of Undisputed Material Facts ("Def. RSUMF") ¶¶ 78-79. This case is about whether the law requires Lumen Eight to obtain permits before installing the LED signs.

In choosing not to apply for sign permits, Lumen Eight relied on its own interpretation of applicable sign regulations, without consulting with DCRA. *See* Def. SUMF ¶¶ 109-112. In formulating its business plan, Lumen Eight consulted several experts, who opined that permits were not necessary. *See* Def. SUMF ¶¶ 84-100. Lumen Eight proceeded with the first steps of its plan, which included (1) executing leases for digital sign locations, (2) obtaining electrical and bracket permits from DCRA for those locations, and (3) installing electrical modifications and brackets at those locations. *See id.* at ¶¶ 106-112. But before Lumen Eight was able to put up the signs themselves, DCRA learned of Lumen Eight's activities and took action to stop Lumen Eight. Between August 16, 2016, and September 7, 2016, DCRA issued stop-work orders against Lumen Eight; and in August of 2016, the District filed the instant law suit against Lumen Eight to enforce D.C. construction codes, contending that the unpermitted signs are unlawful. *See* Pl. SUMF ¶ 76; Def. SUMF ¶ 325, Ex. 102 (Stop Work Orders), Ex. 103 (Stop Work Orders); Compl., filed August 31, 2016.

The District asserts that Lumen Eight's failure to obtain permits for its signs was part of a deliberate strategy to evade regulation. *See* Pl. Mot. at 10-17. The District contends that Lumen Eight knew that any permit applications for its signs would be denied, and that Lumen Eight endeavored to put up the signs quickly and stealthily, hoping that its property interest in the signs

2014 and 2015, including entering leases and applying for bracket and electrical permits. *See* Def. SUMF ¶¶ 81, 82, 84, 131. For present purposes, the Court attributes the actions of DOMI to Lumen Eight.

would "vest" or become "grandfathered" before DCRA could mount enforcement actions against Lumen Eight or change existing sign regulations. *See id*. Lumen Eight does not deny that it attempted to erect its signs without seeking permits, but it argues that it had a well-supported belief that permits were not required. *See* Def. Mot. at 34-50. In any event, Lumen Eight's decision to proceed without permits was a calculated gamble, for it knew that DCRA could mount an enforcement action against it that might doom the company's plans to install and profit from its signs. *See* Pl. Mot. at 10-12, Ex. 18 (memorandum explaining that outdoor advertising is heavily regulated in D.C.), Ex. 19 (August 10, 2015, email sending Exhibits 18 and 20 to DOMI Principal Donald MacCord), Ex. 20 (memorandum explaining that Lumen Eight's signs may be "subject to permitting and regulation," and that the District could respond to its signs with emergency legislation), Ex. 21 (May 2014 lease agreement between Lumen Eight and property owner Jamal's Darth Vadar LLC providing right to terminate lease if D.C. regulations changed).

The proposed signs at issue fall roughly into two categories: (1) Outdoor signs that are recessed, and therefore are within the "footprint" of a building ("exterior signs"); and (2) Indoor signs that are set back more than 18 inches from a window or door, but can be seen from outside of the property ("glassed-in signs").[3] At the time that Lumen Eight launched its plan to install unpermitted signs, the applicable sign regulation was a prior version of 12-A DCMR § N101.3.5.3, which had been in effect at least since 2010,[4] and has been called the "Legacy Regulation" in this litigation. The Legacy Regulation provides: "Signs within a building. Any

[3] The Court previously addressed glassed-in signs that were not intended to be viewed from other properties by granting Lumen Eight's Motion for Partial Summary Judgment. *See generally* Transcript of Hearing on December 4, 2017 (Dec. 4 Transcript); *see also* Order, dated December 18, 2017.

[4] The text of the Legacy Regulation was previously located at 12 DCMR § 3107.3.5.3. *See* Def. Mot., Ex. 5 (12 DCMR § 3107.3.5.3 (2010) (repealed 2014)). The Legacy Regulation was moved to 12-A DCMR § N101.3.5.3 in 2014, when the District enacted the District of Columbia Construction Codes Supplement of 2013. *See* 61 D.C. Reg. 2782, 2784 (March 28, 2014).

sign located within a building, not attached directly or painted on a window, and not located within 18 inches (457 mm) of a window or entrance," is not subject to permitting requirements. *See* 12-A DCMR § N101.3.5.3 (2014).[5]

This Court has ruled, and the parties now agree, that Lumen Eight's glassed-in signs do not require permits under the Legacy Regulation. *See* Dec. 4 Transcript at 65:10-19, 66:23-67:5, 101:20-21; Pl. Mot. at 42-50; Def. Mot. at 35-36. The parties dispute, however, whether the Legacy Regulation exempted Lumen Eight's exterior signs from the permit requirement. Specifically, the parties disagree about whether "within a building" under the Legacy Regulation means "inside" a building, or "within the footprint" of a building. Lumen Eight argues that its exterior signs, which are under overhangs, do not require permits because they are "within the footprint" of a building and therefore are "within a building." *See* Def. Mot. at 34-40. The District argues that the plain meaning of "within a building" is "inside" of the building, and that Lumen Eight's exterior signs therefore require permits. *See* Pl. Mot. at 43-50.

In July of 2016, the District's City Administrator sought to adopt an emergency regulation (the "Emergency Rule"), which amended the Legacy Regulation to clarify that the construction of glassed-in signs and signs under overhangs would require permits. The Emergency Rule provides:

> Signs within a building. Any sign located entirely inside a building, unless the sign: (1) is attached directly or painted on a window; (2) is located within 18 inches (457 mm) of a window or entrance; or (3) contains writing that is legible, or an image that is clearly discernible, from property other than the property on which the sign is located. A sign inside a building that

[5] 12-A DCMR § N101.3 provides that all signs require permits "unless exempted by Section 101.3.5." *See* 12-A DCMR § N101.3 ("Permits. No sign subject to the provisions of Section 101 that exceeds 1 square foot (0.093 m<2>) in area, unless exempted by Section 101.3.5, shall be erected, made a part of a building, painted, repainted, placed, replaced, hung, re-hung, altered, repaired structurally, changed in color, made to flash, or maintained, without a permit issued in accordance with this section by the code official."); *see also* § N101.3.5 ("Exemptions from permit. The types of signs and advertising specified in Sections N101.3.5.1 through N101.3.5.7 do not require permits unless located within areas requiring review by the Commission of Fine Arts.").

> (1) is attached directly or painted on a window; (2) is located within 18 inches (457 mm) of a window or entrance; or (3) contains writing that is legible, or an image that is clearly discernible, from property other than the property on which the sign is located shall require a permit and shall be regulated as a sign under this Appendix N.[6]

The parties agree that the Emergency Rule, if valid, would require Lumen Eight to obtain permits from DCRA to install all of Lumen Eight's proposed signs. The parties dispute whether the Emergency Rule was promulgated in compliance with the District of Columbia Administrative Procedure Act ("DCAPA") and D.C. Code § 6-1409. *See* Pl. Mot. at 34-42: Def. Mot. at 2-34. If the Emergency Rule were invalid, then the Legacy Regulation would determine whether Lumen Eight's exterior signs require permits.

PROCEDURAL HISTORY

On August 31, 2016, the District filed a verified Complaint against defendants Lumen Eight and the property owners with whom Lumen Eight had contracted to display its signs. *See* Compl. ¶ 4.[7] The District's Complaint includes ten causes of action for illegal construction, based on Lumen Eight's installation of LED signs without sign permits from DCRA. *See generally id.* The District seeks injunctive relief requiring all defendants (1) to stop construction related to the installation of brackets or LED signs in the District of Columbia without prior authorization from DCRA; (2) to comply with all DCRA orders; (3) to identify all locations in

---

[6] The Emergency Rule was enacted for 120 days. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016). The Emergency Rule was extended by two additional emergency rules lasting 120 days each. *See* 63 D.C. Reg. 13718 (Nov. 4, 2016); 64 D.C. Reg. 2407 (Mar. 3, 2017). The text of the 2016 Emergency Rule was permanently adopted through notice-and-comment rulemaking on June 27, 2017, and became effective on June 30, 2017. *See* 64 D.C. Reg. 006105-06 (June 30, 2017); *see also* 12-A DCMR § N101.3.5.3.

[7] Those other defendants were: (1) Jemal's Darth Vader LLC ("Jemal's"); (2) Douglas Development Corporation ("Douglas"); (3) Thomas Circle; (4) UBS Real Estate Investments, Inc. ("UBS"); (5) NH Street Partners Holding LLC ("NH Street"); (6) 1350 Connecticut Avenue Limited Partnership ("1350 Connecticut"); (7) Liberty 2100 M Street LP ("Liberty"); (8) Western Washington D.C. Corporate Center LLC ("Western Washington"); and (9) CLPF-CC Pavilion ("CLPF-CC"). *See id.* ¶¶ 165-195. Thomas Circle, UBS, 1350 Connecticut, and Liberty have been dismissed from this litigation. *See* Praecipe of Dismissal, dated September 1, 2016 (Thomas Circle); Order, dated September 9, 2016 (UBS); Stipulation of Dismissal, dated October 18, 2017 (Liberty); Order, dated November 13, 2018 (1350 Connecticut).

D.C. where defendants have installed brackets and LED signs; and (4) to remove all such brackets and LED signs. *See id.* at 35.

On August 31, 2016, the District also filed a motion for a temporary restraining order and a preliminary injunction. On November 10, 2016, the Honorable Alfred S. Irving granted the District's motion for a preliminary injunction, ordering Lumen Eight "to cease sign-related work that [Lumen Eight] has planned for the exterior of certain buildings, . . . [and] to cease sign-related work as to all signs [Lumen Eight] has planned to install on the inside of buildings set back at least 18 inches from a window or entrance . . . ." *See* Order, dated November 10, 2016.

On September 23, 2016, Lumen Eight filed an Answer and Counterclaim against the District. Lumen Eight alleges in its Counterclaim that the District "engaged in improper and selective enforcement efforts against [Lumen Eight] for installing signs 'within a building' pursuant to a long-standing provision of the District of Columbia's Building Code that exempts such signs from sign permit requirements [*i.e.,* the Legacy Regulation]." *See* Answer & Counterclaim at 32. Lumen Eight also alleges that the District violated the DCAPA when it passed the Emergency Rule. Lumen Eight seeks a declaratory judgment that: (1) the Emergency Rule requiring Lumen Eight to obtain permits for its signs is invalid; (2) the stop work orders issued against it by DCRA are void and unenforceable; (3) the District has no basis to issue additional stop work orders; and (4) Lumen Eight's proposed signs do not require permits. *See id.* ¶ 123. Lumen Eight further requests an injunction preventing the District from interfering with all defendants' contractual rights and with Lumen Eight's installation of signs. *See id.* at 57.[8]

[8] Lumen Eight also brought claims under 42 U.S.C. § 1983, alleging violations of the Due Process and Takings Clauses of the Fifth Amendment. *See generally id.* The Court granted the District's Motion to Dismiss as to defendants' § 1983 counterclaims at a hearing on December 4, 2017. *See generally* Dec. 4 Transcript.

Lumen Eight filed a Motion for Partial Summary Judgment and Modification of the Court's Preliminary Injunction on July 13, 2017. *See generally* Def. Mot. for Partial Summ. J. Lumen Eight argued that signs at eight of its leased locations would be set back more than 18 inches from a window; would not "contain writing that is legible, or an image that is clearly discernible, from property other than the property on which the sign is located;" and thus would not require permits under either the Legacy Regulation or the Emergency Rule. *See id.*; *see also* 12-A DCMR § N101.3.5.3. On December 4, 2017, the Court granted Lumen Eight's Motion for Partial Summary Judgment, ruling that ten signs at eight locations would not require sign permits under either of the regulations under consideration by the Court. *See generally* Dec. 4 Transcript.[9]

Lumen Eight filed two additional motions to modify the preliminary injunction based on information that it obtained during discovery. Both motions were denied. *See generally* Transcript of Hearing on July 2, 2018; Transcript of Hearing on February 26, 2019.

APPLICABLE LEGAL STANDARD

"Summary judgment is a remedy that entitles the moving party to judgment as a matter of law when no genuine issue of material fact is present at the time the motion is made." *See Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058, 1059 (D.C. 1983). The purpose of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in

[9] The District filed an Emergency Motion for an Administrative Stay of the Court's December 4, 2017, ruling. *See* Pl. Emergency Mot. for Admin. Stay of Court's Dec. 4, 2017 Ruling, filed December 6, 2017. After Lumen Eight filed a Response on December 14, 2017, the Court denied the District's Motion. *See generally* Order, dated December 18, 2017. On December 20, 2017, the District filed a Motion for Stay of the Court's December 4, 2017 Oral Ruling and the Court's December 18, 2017 Written Order; and a Motion for Reconsideration and Clarification of the Court's December 4, 2017 Oral Ruling and the Court's December 18, 2017 Written Order. Lumen Eight filed Oppositions to the District's motions on January 3, 2018 and January 4, 2018, respectively. The Court then partially granted the District's Motions, finding that one sign subject to the Order on Lumen Eight's Partial Motion for Summary Judgment was not exempt from the Emergency Rule's permitting requirements, and modifying its previous Order of December 7, 2017, to exclude that sign. *See* Order, dated January 9, 2018.

order to determine whether trial is actually required." *See Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996) (internal citation omitted).[10]

To prevail on a motion for summary judgment, "[t]he moving party must first establish that there is no genuine issue of material fact." *See Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310, 313 (D.C. 1982). A material fact is "one which, under the applicable substantive law, is relevant and may affect the outcome of the case." *See Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1321 (D.C. 1994). "Any doubt as to whether or not an issue of fact has been raised is sufficient to preclude a grant of summary judgment." *See McCoy v. Quadrangle Dev. Corp.*, 470 A.2d 1256, 1259 (D.C. 1983).

If the moving party carries its initial burden, "the burden shifts to the non-moving party to show the existence of an issue of material fact." *See Landow*, 454 A.2d at 313. To meet this requirement, the non-moving party must proffer "some significant probative evidence" tending to support his or her contentions "so that a reasonable fact-finder would return a verdict for the non-moving party." *See Brown v. 1301 K. St. Lit. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (internal quotation omitted). The non-moving party must do more than rely on conclusory allegations or denials in his or her pleadings and must establish more than a "metaphysical doubt" or a "scintilla of evidence." *See Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010) (quoting *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005)); *accord Boulton v. Inst. Of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *See*

[10] *See Cohen v. Owens & Co.,* 464 A.2d 804, 906 n.3 (D.C. 1983) ("Super. Ct. Civ. R. 56, in its entirety, is identical to FED. R. CIV. P. 56 . . . . [W]hen a local rule and a federal rule are the same, we may look to federal court decisions interpreting the federal rule as 'persuasive authority in interpreting [the local rule].'") (quoting *Vale Props. v. Canterbury Tales, Inc.*, 431 A.2d 11, 13 n.3 (D.C. 1981)).

Barrett v. Covington & Burling, LLP, 979 A.2d 1239, 1245 (D.C. 2009) (internal citation omitted).

In considering the merits of the moving party's request, the Court reviews the record in the light most favorable to the non-moving party, "drawing all reasonable inferences from the evidence in the non-moving party's favor." *See Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011). The Court may not "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett*, 979 A.2d at 1244 (internal citation omitted). In ruling upon a motion for summary judgment, the Court reviews "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact." *See D.C. v. Gray*, 452 A.2d 962, 964 (D.C. 1982) (internal citations omitted).

ANALYSIS

The District contends that the Court need only apply the validly enacted Emergency Rule (and its extensions) to end the instant litigation in the District's favor. *See* Pl. Mot. at 34-42. In contrast, Lumen Eight argues that it should prevail as a matter of law because the Emergency Rule is invalid, and Lumen Eight is not required to obtain sign permits under the Legacy Regulation. *See generally* Def. Mot. For the following reasons, the Court finds that the Emergency Rule is valid. Moreover, regardless of whether the Legacy Regulation required Lumen Eight to secure permits for its exterior signs, Lumen Eight does not have a vested interest in the installation of any signs under the Legacy Regulation. Accordingly, none of Lumen Eight's signs may be installed without permits from DCRA.

A. The Emergency Rule

DCRA administers and enforces the District's building and construction codes, in part by issuing permits for the installation of signs. *See* D.C. Code § 6-1405.01, *et seq.* (2020); 12-A DCMR § N101A (2020) (the "Sign Code"). The Sign Code governs "the erection, hanging, placing, painting, display, and maintenance of outdoor display signs and other forms of exterior advertising." *See* 12-A DCMR § N101.1. Under the Sign Code, all signs larger than one square foot in area that do not fall within an enumerated exception require a permit. *See id.* § N101.3.

The District, through DCRA and other relevant agencies, plainly is entitled to make policy judgments about the types of signs that may be displayed in this jurisdiction, and about the procedures that must be followed to lawfully install such signs. But the District obviously must abide by the DCAPA and other relevant laws when promulgating sign-related rules and regulations. Lumen Eight argues that the Emergency Rule is an invalid amendment of the permit exception for "signs within a building," because the Emergency Rule (1) was not justified by a valid emergency, as required by the DCAPA; (2) was not duly "adopted" under the DCAPA; and (3) could not have become effective immediately, under D.C. Code § 6-1409. *See* Def. Mot. at 2-34. The Court disagrees.

1. *The City Administrator's determination of an emergency was valid.*

Under the DCAPA, a proposed regulation generally must go through notice-and-comment rulemaking before becoming effective. *See* D.C. Code §§ 2-503, 505(a). When notice-and-comment rulemaking is required, a proposed regulation is published in the D.C. Register 30 days prior to its effective date to "afford all interested persons opportunity to submit data and views either orally or in writing." *See id.* § 505(a). But when the Mayor or her designated agent determines that there is an "emergency" and that "the adoption of a rule is

necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor . . . may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately." *See id.* § 505(c); *see also id.* § 502(1)(A). The Mayor has designated the City Administrator as her agent in the adoption of emergency rules. *See* Mayor's Order 2015-036 (Jan. 9, 2015). Here, Lumen Eight argues that the Emergency Rule is invalid because it was not necessitated by a *bona fide* emergency. *See* Def. Mot. at 2-3.

a. The standard of review

Whether an emergency exists, justifying an immediate rulemaking under DCAPA § 502(c), is a determination by the executive branch based on factual and policy considerations that are that are entitled to deference. *See ABC, Inc. v. D.C. Dep't of Emp't Servs.*, 822 A.2d 1085, 1088 (D.C. 2003) ("we generally give some deference to decisions rendered by administrative agencies. Such deference merely reflects the statutory authority entrusted to an agency to regulate a particular area of public activity."); *Gondelman v. D.C. Dep't of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1245 (D.C. 2002) ("we give deference to the expertise of an agency"); *see also Pauley v. Bethenergy Mines*, 501 U.S. 680, 687 (1991) (where agency decisions "require significant expertise and entail the exercise of judgment grounded in policy concerns . . . courts appropriately defer to the agency entrusted . . . to make such policy determinations").[11] The only precedent directly on point suggests that this Court should review

[11] Lumen Eight argues that an agency's emergency determinations are not entitled to deference, and should be reviewed *de novo* by the Court. *See* Def. Mot. at 5-6. But the cases cited by Lumen Eight, *Jubilee Hous. Inc. v. D.C. Water & Sewer Auth.*, 774 A.2d 281 (D.C. 2001), and *Sorenson Commc'ns., Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014), do not support that position. In *Jubilee,* the court reviewed the trial court's interpretation of the applicable statute *de novo*, not the actions of the agency. *See Jubilee*, 744 A.2d 281 (D.C. 2001) (citing *District of Columbia v. Gallagher*, 734 A.2d 1087, 1090 (D.C. 1999) ("We review the trial court's construction of the Act *de novo*, but at the same time we give deference to the interpretation adopted by the agency that administers the Act."). *Sorenson* addressed a section of the federal APA, allowing agencies to permanently bypass notice and comment rulemaking for "good cause." *See Sorenson*, 755 F.3d at 706. The court there found that deferring to an agency under that provision would "run afoul of congressional intent" to provide a narrow exception to notice-and-comment rulemaking. *See id*. Unlike the "good cause" exception, DCAPA § 502(c) does not allow agencies to permanently

the District's emergency determination for "reasonable[ness] under the circumstances." *See Jubilee*, 774 A.2d at 294 (Reid, J. dissenting) (dissent adopted by majority in relevant part). There is also precedent for upholding the government's finding of an "emergency" if that finding is supported by "substantial evidence." *See* § 510(a)(3)(E) (granting courts power to "hold unlawful and set aside any action or findings and conclusions found to be . . . [u]nsupported by substantial evidence in the record of the proceedings before the Court"); *see also Hobson v. District of Columbia*, 304 A.2d 637, 638 (D.C. 1973) (applying "substantial evidence" review to an emergency regulation enacted by the City Council under the Council's own procedural rules and not the DCAPA). "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Compton v. D.C. Bd. of Psychology*, 858 A.2d 470, 476 (D.C. 2004) (internal citations and quotations omitted).

b. The scope of administrative record

The parties dispute the scope of the administrative record that the Court should consider in determining whether an emergency justified the District's promulgation of the Emergency Rule. Lumen Eight focuses on the City Administrator, Rashad Young, as an individual, and asserts that the Court should consider only what Mr. Young relied upon in approving the Emergency Rule, as articulated by Mr. Young at his deposition. *See* Def. Mot. at 6-8. The District responds that the administrative record under review should include any information that was before the government at the time of its decision, and that has since been presented to this Court. *See* Pl. Opp. at 7 n.2.

The Court is not aware of any authority that requires a reviewing court to limit the administrative record to what one, individual official remembers as the basis of a decision.

---

bypass normal rulemaking procedures; rather, § 502(c) allows emergency rules to remain in effect for only 120 days. *See* D.C. Code § 2-502(c). *Sorenson* is therefore inapposite.

Review of relevant precedents reveals that the Court of Appeals has considered a broader record when evaluating agencies' emergency actions. In *Jubilee*, the court addressed an emergency rule, adopted by the newly-created D.C. Water and Sewer Authority ("WASA") board, which imposed payment rates on non-profit and religious organizations that previously had received free water and sewer services. *See Jubilee*, 774 A.2d at 288. The WASA board promulgated the emergency rule at a meeting on December 5, 1996, after adopting the report and recommendation of its Retail Rate Committee. *See id.* at 287. In reviewing the establishment of the rule, however, the Court of Appeals did not limit the administrative record to the recollection of the WASA board members, the minutes of the meeting on December 5, 1996, and the Retail Rate Committee Report. Instead, the court examined all of the circumstances that supported the WASA board's decision. *See id.* at 286-88, 294.[12]

[12] Specifically, the court considered the text of the act creating WASA, which empowered WASA to determine service rates and set deadlines by which it had to do so. *See id.* at 286-87. The court also looked at a report written by the D.C. Council's Committee on Public Works and the Environment, which recommended WASA's creation in order to "enhance the financial viability" of water and sewer services in the District. *See id.* at 286. Finally, the court examined WASA board meeting minutes from September 26, 1996, when the issue of payment by non-profit and religious institutions was raised and noted as a "future action item;" and from October 3, 1996, when WASA first addressed the issue by hearing from a D.C. Department of Public Works official, and then referring the issue to the Retail Rate Committee. *See id.* at 287. Based on all of this information, the court determined that "financial and budgetary constraints" and the "deteriorating condition of the water and sewer system" had created an emergency that justified WASA's rule. *See id.* at 294.

No other case suggests that the administrative record should be limited to the recollection of one government official. To support its view, Lumen Eight cites an unpublished case from the U.S. District Court for the District of Columbia, *Wheelchair Carriers Ass'n v. District of Columbia*, No. 00-1586, 2002 U.S. Dist. LEXIS 4617 (D.D.C. March 12, 2002). *See* Def. Mot. at 12-14. In that case, the Commission on Health Care Finance ("CHCF") enacted an emergency rule to cut reimbursement rates for transportation providers serving Medicaid recipients. *See Wheelchair Carriers*, 2002 U.S. Dist. LEXIS 4617 at *2-*3. In reviewing the administrative record that supported the emergency rule, the court did not confine its inquiry to what the CHCF Commissioner knew at the time that the CHCF adopted the rule. Rather, the court considered a broader record, including an initial discussion about reimbursement reduction among the CHCF Commissioner, his staff, and members of the Wheelchair Carriers Association. *See id.* at *2, *7. The court also looked at minutes of a D.C. Medical Care Advisory Committee meeting, where the Commissioner first publicly addressed the potential cost-cutting measure, but never mentioned an emergency. *See id.* at *2, *7. Because the text of the emergency rule stated that it was "necessary to ensure that expenditures for the Medicaid Program are consistent with the District government's budget authority and resources," the court reviewed the D.C. Medicaid budget. *See id.* at *7-*8. Finally, the court considered that "neither [the CHCF Commissioner] nor any other employee of CHCF or DHS [(Department of Human Services)] expressed the opinion that an emergency existed." *See id.* at *7. Only after looking at all of the information before the CHCF did the court decide that there was "no evidence" that an emergency existed. *See id*.

In addition to being contrary to precedent, limiting the administrative record to the recollection of one official would be counterintuitive and inconsistent with the way that the D.C. government is intended to function. The D.C. Code contemplates that the Mayor, her staff, and government agencies will operate together to execute the laws of the District, specifying that the Mayor "shall, through the heads of administrative boards, offices, and agencies, supervise and direct the activities of such boards, offices, and agencies." *See* D.C. Code § 1-204.22(4) (2020). The Mayor also must appoint a City Administrator who "shall be the chief administrative officer of the Mayor, and he shall assist the Mayor in carrying out [her] functions under this chapter, and shall perform such other duties as may be assigned to him by the Mayor." *See id.* § 204.22(7). In 2015, the Mayor further "vested" the City Administrator with her "supervisory authority over the operations and administrative activities of all officers, departments, and agencies within the Executive Branch of the District of Columbia Government, except the Executive Office of the Mayor." *See* Mayor's Order 2015-036 (Jan. 9, 2015). The City Administrator, when exercising the Mayor's authority through a valid delegation, must act "through the heads of administrative boards, offices, and agencies," just as the Mayor does. *See* § 204.22(4).

These statutory provisions strongly suggest that actions taken by the District and decisions made by the District are the result of collective efforts by numerous individuals employed by the government. Indeed, the District is entitled to draw upon expertise and experience from a variety of government officials and offices, and this broad base of knowledge benefits the citizens of the District of Columbia. Thus, it is artificial and unduly restrictive to attribute the decisions and actions of the District to a single person. A more expansive view of

---

Finally, *Hobson* is distinguishable. In that case, the emergency legislation was enacted by the City Council at an emergency meeting, which was called to address the issue of passengers refusing to pay bus fare. Accordingly, all evidence considered by the City Council was in the public hearing record reviewed by the court. *See Hobson*, 304 A.2d 637 at 639.

who constitutes "the government" in this instance is accurately reflected in an email from the General Counsel for the City Administrator, Barry Kreiswirth, to Randi Powell of the Office of Policy and Legislative Affairs ("OPLA"), which explains that agency staff operates as the staff of the City Administrator with respect to rulemaking related to a given agency's area of expertise. *See* Pl. Opp., Ex. 1 (June 2016 emails regarding emergency rulemaking between District staff ("June 2016 D.C. staff emails")) ("When the CA [City Administrator] has issued rules on behalf of other agencies . . . we've still listed the relevant agency staff (not OCA [Office of the City Administrator] staff) as the point of contact, since they were essentially staffing the CA on the specific matter."). Accordingly, the Court will consider all of the relevant information considered by the District, broadly defined, at the time that the Emergency Rule was enacted.

c. The District's finding of an emergency was reasonable and supported by substantial evidence.

In its initial Notice of Emergency and Proposed Rulemaking, the District stated that "[t]he emergency rulemaking [was] necessary to ensure that unpermitted, quasi-exterior signage does not proliferate across the District." *See* 63 D.C. Reg. 11000 (August 26, 2016). Although concise, this published statement clearly identifies the emergency that was to be addressed by the new rule: the proliferation of unpermitted, quasi-exterior signage across the District.[13] The record reflects that the District considered such signage to be unsafe and visually undesirable; and that an emergency arose when Lumen Eight embarked on its plan to erect unpermitted LED signs in a compressed time frame, apparently in order to avoid regulation. *See* Pl. Opp., Ex. 1 (June 2016 D.C. staff emails), Ex. 7 (Deposition of City Administrator Rashad Young) at 19-23,

[13] Lumen Eight contends that the District did not give "justification for emergency rulemaking action which clearly explains why the action is necessary for the immediate preservation or promotion of the public peace, health, safety, welfare, or morals" as required by the DCAPA. *See* 1 DCMR § 311.5; Def. Mot. at 7-9. The Court agrees with the District that the terse explanation provided in the Notice of Emergency and Proposed Rulemaking is legally sufficient, and Lumen Eight fails to cite any authority to the contrary. *See* Pl. Opp. at 12; Def. Mot. at 7-9.

35 ("The emergency was that signs were being erected without a permit."); Pl. Response to Def. Statement of Undisputed Material Facts ("Pl. RSUMF") ¶¶ 109, 180, 226, 232.

The District was concerned about unpermitted signage as early as 2010. At that time, DCRA became aware of the possibility that sign companies could interpret the Legacy Regulation to allow the installation of exterior, recessed signs without a permit.[14] DCRA was also concerned about large, unpermitted signs in glass atriums and building lobbies. *See* Def. SUMF ¶ 24. In response, DCRA and the Construction Codes Coordinating Board ("CCCB")[15] worked with the City Administrator's Office to enact an emergency rule ("2011 Emergency Rule") to address these potential problems. *See* Def. SUMF ¶¶ 12, 16, 19-22, 24-25, 27-31; *see also* Pl. RSUMF ¶¶ 12, 16, 19-22, 24-25, 27-31.[16] The 2011 Emergency Rule was published in the D.C. Register on May 6, 2011, and was effective for 120 days. *See* 58 D.C. Reg. 4042 (May 6, 2011); Def. SUMF ¶ 32.[17] The 2011 Emergency Rule provided as follows:

---

[14] In August of 2010, Chris Tavlarides of Capitol Outdoor contacted then-Director of DCRA Linda Argo and DCRA officials Helder Gil and Rabbiah Sabbakhan. *See* Def. SUMF ¶ 9, Ex. 25 (August 2010, emails between Mr. Tavlarides, Ms. Argo, Mr. Gil, and Mr. Sabbakhan); *see also* Pl. RSUMF ¶ 9. Mr. Tavlarides stated that a loophole in the Legacy Regulation could lead to the proliferation of unpermitted, exterior signs "underneath walkways in front of buildings" throughout the District, and suggested that the District enact an emergency rule to address the potential issue. *See* Def. SUMF ¶ 9, Ex. 25 (August 2010, emails between Mr. Tavlarides, Ms. Argo, Mr. Gil, and Mr. Sabbakhan); *see also* Pl. RSUMF ¶ 9.

[15] The CCCB is a 13-member board established by the Mayor in 2009, which is responsible for reviewing, maintaining, and proposing changes to D.C. construction codes and regulations. *See* 56 D.C. Reg. 2049 (March 6, 2009) (Mayor's Order establishing CCCB).

[16] At its October 2010 meeting, the CCCB voted in favor of a Code Change Proposal amending the Legacy Regulation. *See* Def. SUMF ¶ 16; *see also* Pl. RSUMF ¶ 16. On March 25, 2011, the CCCB voted to amend the Legacy Regulation. *See* Def. SUMF ¶¶ 19-20. Mr. Gil of DCRA drafted a Notice of Emergency and Proposed Rulemaking reflecting the CCCB's proposed changes, which he sent to Mr. Kreiswirth of the City Administrator's Office on March 30, 2011. *See* Def. SUMF ¶¶ 21-22, 24, Ex. 11 (March 29, 2011, email from Mr. Gil with 2011 Notice of Emergency and Proposed Rulemaking draft attached) (SEALED), Ex. 14 (March 30, 2011, email from Mr. Gil to Mr. Kreiswirth with 2011 Notice of Emergency and Proposed Rulemaking attached) (SEALED); *see also* Pl. RSUMF ¶¶ 21-22, 24. Mr. Kreiswirth and Mr. Gil further edited the 2011 Notice of Emergency and Proposed Rulemaking, which they then sent to the Office of the Attorney General ("OAG") for review, along with a Rule Transmittal Form signed by the CCCB's Acting Chairperson. *See* Def. SUMF ¶¶ 25, 27-31.

[17] The Notice of Emergency and Proposed Rulemaking stated that the "emergency rulemaking is necessitated by the need to protect the public safety and welfare from the proliferation of commercial signs advertising products, services, and goods that are not sold on-site and that currently exempt from permit requirements." 58 D.C. Reg. 4042 (May 6, 2011); Def. SUMF ¶ 32.

> Signs within a building. Any sign located within the interior envelope of a building, including any atrium, foyer, or lobby, not attached directly to or painted on a window, and not located within eighteen inches (18 in.) (457 mm) of a window or entrance.
> Exceptions: The following signs are not subject to the exemption from permit under this subsection; provided, that they are meant to be seen from the public space:
> 1. A commercial sign for a product that is not sold on the premises of the building;
> 2. A commercial sign using video, electrical, or digital displays of any sort; or
> 3. A commercial sign that exceeds twenty percent (20%) of the area of any window in which it is displayed or viewed from the public space.

See 58 D.C. Reg. 4042-43 (May 6, 2011); Def. SUMF ¶ 32. A permanent change to the Legacy Regulation was not enacted before the 2011 Emergency Rule expired, because "it didn't appear that [2011 Emergency Rule] was having an impact because the threatened influx of large signs didn't appear to be occurring." *See* Def. SUMF ¶¶ 34-35, Ex. 131 (Deposition of DCRA Legislative Affairs Specialist Helder Gil) at 231-32, Ex. 153 (D.C. Sup. Ct. Civ. R. 30(b)(6) Deposition of Senior Assistant Attorney General Laurie Ensworth) at 108:4-10; *see also* Pl. RSUMF ¶¶ 34-35.

The Legacy Regulation was again discussed by the CCCB in 2015, and these discussions ultimately led to the enactment of the Emergency Rule that is the subject of the instant litigation. On December 17, 2015, the CCCB adopted a proposal to modify the Sign Code. *See* Def. SUMF ¶¶ 185, 193; Pl. Opp., Ex. 5 (December 17, 2015, CCCB meeting minutes). In recommending that the sign code be changed, the CCCB considered the potential "proliferation of signs in lobbies or inside ground-level businesses that can be seen from the street or sidewalk" under the Legacy Regulation and other parts of the Sign Code. *See* Pl. Opp., Ex. 5 (December 17, 2015, CCCB meeting minutes). The Rule recommended by the CCCB was to be introduced as a Notice of Proposed Rulemaking by the Mayor. *See* Def. SUMF ¶¶ 165-67, 173, 175, 185, 193;

Pl. Opp., Ex. 1 (June 2016 D.C. staff emails). The CCCB's draft rule defined "signs within a building" as:

> Any sign located entirely inside a building that is not visible from property other than the property on which the sign is located. A sign inside a building that is visible from property other than the property on which the sign is located shall require a permit and shall be regulated as a sign under this Appendix N.

See Def. Mot., Ex. 79 (June 21, 2016, email from Ms. Powell to Ms. Ensworth with draft rule attached).

In June 2016, the District became aware of Lumen Eight's plan to install unpermitted, LED signs in the District. On June 21, 2016, Alice Kelly of the District Department of Transportation ("DDOT") received an email from one of Lumen Eight's competitors, reporting that "a company [Lumen Eight] is coming into the District and exploiting the 18 inches behind the window loophole," and including a "picture . . . as 'proof' that it is now happening for real." *See* Pl. Opp., Ex. 1 (June 2016 D.C. staff emails). Thereafter, a discussion began among District employees at various agencies -- including DCRA, DDOT, OAG, OPLA, and the City Administrator's Office -- about whether the 2015 proposed rule should be enacted as an emergency rule, in response to Lumen Eight's conduct.[18] On June 22, 2016, Ms. Ensworth (of OAG) asked Ms. Powell (of OPLA) if there was "any interest in doing [CCCB's proposed rule] as an emergency rulemaking," referencing the recent discussions about Lumen Eight. *See* Def. SUMF ¶ 186, Ex. 80 (June 2016 emails regarding emergency rulemaking between District staff).

[18] On June 21, 2016, Ms. Powell (of OPLA) sent the draft rule recommended by the CCCB to Laurie Ensworth, Senior Assistant Attorney General at OAG. *See* Pl. Opp., Ex. 1 (June 2016 D.C. staff emails). On June 21, 2016, Ms. Ensworth provided information from Ms. Kelly about Lumen Eight to Mr. Kreiswirth of the City Administrator's Office and Matt Orlins of DCRA. See Pl. RSUMF ¶¶ 180-81; Pl. Opp., Ex. 1 (June 2016 D.C. staff emails), Ex. 78 (June 21, 2016, email from Ms. Kelly with pictures of signs sent to Ms. Ensworth and Mr. Orlins, and a reply from Ms. Ensworth copying Mr. Kreiswirth and Ms. Powell); Def. Mot., Ex. 124 (Young Dep.) at 19-23, 35.

On June 23, 2016, Ms. Kelly (of DDOT) and Mr. Sabbakhan (of DCRA) received an email from another competitor of Lumen Eight, entitled, "The digital signs are virtually here." *See* Pl. Opp., Ex. 1 (June 2016 D.C. staff emails). The email included pictures of areas where Lumen Eight was putting up exterior signs; explained that these signs were unlawful under the Legacy Regulation; expressed concern that DCRA-issued permits to install brackets and electricity did not authorize the work actually being done; and indicated that the signs could be "grandfathered" if the District did not act quickly. *See id*. The email was circulated among officials at DCRA, OAG, and DDOT.[19] On the same day, Ms. Ensworth sent an email to the same group of District employees, explaining that "it appears time is of the essence on this rulemaking." *See id.*

On June 24, 2016, Ms. Powell responded to Ms. Ensworth's initial inquiry about issuing an emergency rule, explaining that Ms. Powell (of OPLA), Mr. Kreiswirth (of the City Administrator's Office), and Mr. Orlins (of DCRA) had considered "the current state of affairs," and decided that an emergency rulemaking should be proposed to the City Administrator. *See* Def. SUMF ¶ 190, Ex. 149 (Deposition of General Counsel for the City Administrator Barry Kreiswirth) at 74:7-75:22; Pl. Opp., Ex. 1 (June 2016 D.C. staff emails). Ms. Powell also asked if CCCB or DCRA would help revise the proposed rule attached to Ms. Powell's June 21 email so that it would specifically address the current emergency. *See* Def. SUMF ¶ 190-94, Ex. 81 (June 21, 2016, email from Ms. Powell). Mr. Orlins drafted the Notice of Emergency and

[19] The author of the email was John G. Polis of Capitol Outdoor. Ms. Kelly forwarded Mr. Polis's email to Mr. Orlins, Ms. Ensworth, and other staff members from DCRA and DDOT on the same day that she received it. *See* Pl. Opp., Ex.1 (June 2016 D.C. staff emails). Ms. Kelly also responded to Mr. Polis, stating that the signs referenced in Mr. Polis' email "appear to me to be exterior signs that require permits and thus, if installed today, would be illegal and not grandfathered." *See id.* Mr. Polis responded that "the company installing the unpermitted digital signs is stating that the supposed loophole lets them install the signs and then they will aggressively litigate to keep them up." *See id.*

Proposed Rulemaking for the Emergency Rule, including the statement that the rule was necessary "to ensure that unpermitted, quasi-exterior signage does not proliferate across the District." *See* Def. SUMF ¶ 193, Ex. 149 (Kreiswirth Dep.) at 76:1-7. The text of the Emergency Rule was further edited by at least Ms. Ensworth and Mr. Kreiswirth. *See* Def. SUMF ¶¶ 197-200.[20]

Following these discussions with other District staff, Mr. Kreiswirth and Melinda Bolling, the Director of DCRA, spoke with the City Administrator about the fact that the signs were being erected and the risks that they presented to the public. *See* Pl. Mot., Ex. 5 (Deposition of DCRA Director Melinda Bolling) at 60:2-61:21, Ex. 84 (Kreiswirth Dep.) at 82:3-20; Def. Mot., Ex. 124 (Young Dep.) at 20:7-21:23, 34:7-35:24. The City Administrator was also given a list of the locations at which Lumen Eight's signs were being erected. *See* Def. Mot. Ex. 124 (Young Dep.) at 37:22-25. The City Administrator agreed that the concerns these signs posed included "(1) unsafe installation, (2) visual impediment to traffic, (3) visual blight, and (4) if no quick action were taken, more signs would be erected and potentially be grandfathered and allowed to remain," and decided the Emergency Rule was necessary. *See* Pl. Mot. at 19 (citing Young Dep. at 21, 35-36, 59-60, 109-117).[21]

---

[20] The District continued to get information about Lumen Eight's signs. On July 1, 2016, Ms. Bolling received a letter from Claude Bailey on behalf of Capitol Outdoor expressing further concern about Lumen Eight's signs. *See* Pl. Opp., Ex. 2 (July 1, 2016, letter from Claude Bailey).

[21] *See also* Pl. Opp., Ex. 3 (Kreiswirth Dep.) at 84:7-18 ("So there was a number of factors that went into [Mr. Young's] consideration or determination that there was an emergency. That included the imminence of unpermitted signs being constructed, his safety concerns he had about the signs potentially being unsafe, maybe injuring someone, the concerns about distracting drivers and whether that could create any public safety issues. He was concerned that proliferation of signs would have blighting effect, it would have a negative effect on neighborhood character."), Ex. 7 (Young Dep.) at 35:12-24 ("So there's a concern that [signs] could be unsafe, meaning they could be improperly installed and potentially fall. There was a concern that the signs, depending on where they were located, could be a visual impediment to vehicular traffic and could potentially cause an accident."), 111:12-112:21 (discussing how signs posed visual blight because of "the number of signs, the size of signs, where the signs are, how many . . . in context to whatever the character and nature of that area is"), 114:15-19 (hours of operations and brightness of signs could be blight).

This administrative record contains more than substantial evidence to support the District's finding of an emergency, and clearly demonstrates that the District acted reasonably under the circumstances. The record shows that District officials determined that emergency rule-making was necessary when they became aware in June of 2016 that Lumen Eight was erecting unpermitted signs, based on a perceived loophole in the governing sign regulations, and that there was a risk that the unpermitted signs would be "grandfathered" if the loophole were not closed quickly. *See supra.*[22] Accordingly, the Court discerns no deficiency in the District's finding of an emergency.[23]

---

[22] Lumen Eight notes that the District knew that companies could erect unpermitted signs in reliance on the alleged loophole as early as November of 2015, but the District did not take emergency action until July of 2016. *See* Def. Mot. at 16. Lumen Eight argues that this seven-month delay belies any argument that the Emergency Rule was necessary. *See id.* at 15-17. But Lumen Eight conveniently fails to acknowledge the key change in circumstances between November 2015 and June 2016 -- Lumen Eight's own conduct in erecting unpermitted signs. The record shows that when the District learned in June 2016 that Lumen Eight was actually installing signs in reliance on the loophole, the District took prompt action to promulgate the Emergency Rule in July 2016, and to publish the rule in August 2016. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016).

The fact that the District issued a similar emergency rule in 2011, which expired after 120 days, is irrelevant for the same reasons. *See* 58 D.C. Reg. 4042 (May 6, 2011). At that time, the District was concerned that sign companies would take advantage of a loophole in the Legacy Regulation, and erect signs without permits in building lobbies or under overhangs. *See* Pl. Mot. at 5-6, Ex. 14 (Gil Dep.) at 125; Pl. Reply at 8, Ex. 3 (Ensworth 30(b)(6) Dep.) at 118:6-119:5. The concern was not realized, and no further action was taken. *See supra* A.1.c, at 17; *see also* Pl. Mot. at 5-6. The 2016 Emergency Rule was enacted not in response to the hypothetical risk that a sign company could exploit the loophole, but Lumen Eight's actual construction of unpermitted signs. *See* Pl. Mot. at 19.

[23] This Court's finding is consistent with relevant precedent. The Court of Appeals has upheld two emergency rule-makings, in the *Hobson* and *Jubilee* cases. In *Hobson*, the City Council enacted an emergency regulation requiring public bus passengers to pay an established fare or face criminal sanctions. *See Hobson*, 304 A.2d at 638. The court upheld the finding of an emergency, based on a case striking down a regulation enacted by the D.C. transit authority; a newspaper article with the headline "No Law You Have to Pay Bus Fare"; a letter from the head of the transit authority explaining that "some bus patrons have refused to pay the established bus fare"; the opinion of the Deputy Mayor that an emergency existed; and additional testimony from the transit authority head that the situation was expected to escalate and "disrupt traffic." *See id.* at 639.

In *Jubilee*, the City Council repealed the statutory rates for water and sewer services as well as an exemption for charitable organizations. *See Jubilee*, 774 A.2d at 288. The newly-created WASA was therefore unable to "collect revenues needed to maintain water and sewer services, and to address the deteriorating water and sewer system." *See id.* at 294. WASA promulgated an emergency rule imposing the previous statutory rates on all customers. *See id*. WASA did not provide any formal explanation or justification for its emergency rule, but the court determined that the WASA's actions "fell squarely" within the emergency rule exception to the DCAPA because the circumstances demonstrated that there was a clear emergency. *See id.*

Moreover, the record here stands in contrast to the emergency rulemaking struck down in *Wheelchair Carriers*. In *Wheelchair Carriers*, the emergency rule reducing reimbursement rates for transportation services was allegedly necessary to address budget shortfalls. *See Wheelchair Carriers*, 2002 U.S. Dist. LEXIS 4617, at *2-*3. There was no indication that the minor budget shortfall in question would impact the public peace, health, safety,

2. *The District validly adopted the Emergency Rule and its extensions.*

Lumen Eight argues that because the District failed to follow "statutorily mandated procedures," "the undisputed facts demonstrate that the City Administrator did not adopt the Emergency Rule." *See* Def. Mot. at 23-30. Lumen Eight essentially points to several perceived flaws in the process employed by the District to adopt the Emergency Rule, and argues that those flaws require invalidation of the Rule. *See id.* The District contends that it was not required to establish or follow any particular procedure in adopting the Rule, and that the City Administrator did adopt the Emergency Rule. *See* Pl. Mot. at 19-21, 35-37.

As previously noted, D.C. Code § 2-505(a) provides that the Mayor may "adopt" an emergency rule as may be necessary under the circumstances, and such rule may become effective immediately. "The publication of any document in . . . the District of Columbia Register creates a rebuttable presumption: (1) That it was duly issued, prescribed, adopted, or enacted; and (2) That all requirements of [the DCAPA] have been complied with." D.C. Code § 2-561. Here, it is undisputed that the Emergency Rule was published in the District of Columbia Register on August 26, 2016. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016). Lumen Eight argues, however, that it has successfully rebutted the presumption of the Emergency Rule's valid adoption. *See* Def. Mot. at 23-25; Def. Opp. at 15-24. Lumen Eight essentially argues that the Emergency Rule was not "adopted" because the procedures followed by the District were informal, did not comply with internal policies, and did not require the City Administrator to personally take each of the steps necessary for "adoption." *See* Def. Mot. at 23-27; Def. Opp. at 17-24. In particular, Lumen Eight claims that the City Administrator's failure to specifically

welfare, or morals, such as by reducing access to critical services or by threatening the District's eligibility for federal Medicaid funds. *See id.* at *7-*8. The court therefore found that the "meager record" was insufficient to support an emergency rulemaking. *See id.* at *9. Unlike *Wheelchair Carriers*, the record here demonstrates a clear link between the Emergency Rule and the preservation of public welfare and safety. *See* Pl. SUMF, Ex. 13 (Young Dep.) at 21, 35-36, 59-60, 109-117; Pl. RSUMF ¶ 180.

approve the Emergency Rule's effective date and final regulatory text should render the Emergency Rule void. *See* Def. Mot. at 23-27; Def. Opp. at 17-24.

a. The adoption of the Emergency Rule

The District contends that it "adopted" the Emergency Rule by: (1) submitting the rule, along with a Rule Transmittal Form, to the City Administrator for approval; (2) having OAG review the Emergency Rule for legal sufficiency; and (3) adding an effective date to the text of the Rule Transmittal Form. *See* Pl. Mot., Ex. 84 (Kreiswirth Dep.) at 116:2-117:6; Pl. SUMF ¶ 3; Def. Mot., Ex. 124 (Young Dep.) at 90:18-25. More specifically, the record reflects that between June 24, 2016, and July 1, 2016, Mr. Orlins, Mr. Kreiswirth, and Ms. Ensworth edited the text of the CCCB's proposed rule so that it addressed the emergency posed by Lumen Eight's signs, and drafted the Notice of Emergency and Proposed Rulemaking. *See* Pl. Mot., Ex. 84 (Kreiswirth Dep.) at 125:13-21; Def. SUMF ¶¶ 193-200. On or before July 6, 2016, a Notice of Emergency and Proposed Rulemaking with the Emergency Rule's text, and an attached Rule Transmittal Form were submitted to the City Administrator for his approval and signature. *See* Pl. Mot., Ex. 84 (Kreiswirth Dep.) at 125:19-126:21; Def. SUMF ¶¶ 202-08, Ex. 124 (Young Dep.) at 62-63, 80.[24] On or before July 6, 2016, the City Administrator signed the Rule Transmittal Form, which approved the Emergency Rule and provided for its further processing. *See* Pl. Mot., Ex. 45 (July 6, 2016, email from Mr. Kreiswirth sending Rule Transmittal Form), Ex. 84 (Kreiswirth Dep.) at 125:19-126:21; Pl. SUMF ¶ 3; Pl. Opp., Ex. 19 (Rule Transmittal

[24] Lumen Eight contends that there is no evidence that the attached document was the Emergency Rule that later was published by the District. *See* Def. SUMF ¶¶ 206-211. This fact is disputed, but it is immaterial to whether the City Administrator adopted the Emergency Rule. *See* Pl. RSUMF ¶¶ 206-211. Lumen Eight bases its contention on the fact that the City Administrator could not recall the exact draft attached to the Rule Transmittal Form at his deposition two years later. *See* Def. SUMF ¶ 207; Pl. RSUMF ¶ 207. Other evidence in the record, however, shows that the City Administrator understood that changes would be made before the Rule was finally adopted and published. *See* Pl. RSUMF, Ex. 19 (Kreiswirth Dep.) at 224:21-225:2; Pl. Opp., Ex. 7 (Young Dep.) at 90. Under the circumstances, the perceived deficiency identified by Lumen Eight is insufficient to rebut the statutory presumption that the Emergency Rule was validly adopted. *See* D.C. Code § 2-561.

Forms); Def. SUMF ¶ 202. The Rule Transmittal Form was not dated when the City Administrator signed it. *See* Pl. SUMF ¶ 3; Def. SUMF ¶ 204, Ex. 137 (Ensworth Dep.) at 210.

The Emergency Rule was reviewed for legal sufficiency by OAG, and Ms. Ensworth of OAG informed the City Administrator's office on July 12, 2016, that the Rule was legally sufficient. *See* Pl. Mot., Ex. 5 (Bolling Dep.) at 30:2-31:20, Ex. 84 (Kreiswirth Dep.) at 118:3-22, 152:14-16, Ex. 85 (Ensworth 30(b)(6) Dep.) at 43:11-18; Def. RSUMF, Ex. 124(a) (Young Dep.) at 240:3-24. The Emergency Rule was then given an effective date of July 12, 2016, by Mr. Kreiswirth, the City Administrator's General Counsel, as it was customary to deem a rule effective as of the date that its legal sufficiency was determined. *See* Pl. Mot. Ex. 84 (Kreiswirth Dep.) at 117:21-120:19, 128:4-19, 150:5-16, Ex. 85 (Ensworth 30(b)(6) Dep.) at 22:18-23:4. Mr. Kreiswirth also added the date of July 12, 2016, to the Rule Transmittal Form signed by the City Administrator. *See* Def. Mot., Ex. 93 (July 13, 2016, email from Mr. Kreiswirth to Ms. Ensworth). Thereafter, the Emergency Rule was published in the D.C. Register on August 26, 2016. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016).[25]

The Emergency Rule was extended twice, on November 4, 2016, and March 3, 2017. *See* 63 D.C. Reg. 13718 (Nov. 4, 2016); 64 D.C. Reg. 2407 (Mar. 3, 2017). Similar procedures were followed to implement the extensions. *See* Pl. Opp., Ex. 3 (Kreiswirth Dep.) at 221:10-231:21,

[25] Lumen Eight disputes that the District made its legal sufficiency determination on July 12, 2016. *See* Def. RSUMF ¶¶ 6(c), 7(b). Lumen Eight contends that the legal sufficiency review was not complete until July 13, 2016, because that is when the person with authority to make the determination, Deputy Attorney General in the Legal Counsel Division of OAG Janet Robins, signed a legal sufficiency memorandum. *See id.*; *see also* Def. Mot., Ex. 93 (containing legal sufficiency memorandum). Ms. Robins, however, testified that a memorandum could be written after the actual determination of a rule's legal sufficiency was made. *See* Def. Opp., Ex. 133a (Deposition of Deputy Attorney General Janet Robins) at 55:7-10 ("[W]e tell people that something is legally sufficient. We have told them that, and that we'll write up a memo subsequently."). In fact, she specifically explained that "in this case there was no problem with having the legal sufficiency memo come after because [OAG was] very involved in the process." *See* Pl. RSUMF, Ex. 16 at 229:10-16. This alleged dispute is insufficient to rebut the presumption of the Emergency Rule's valid adoption. *See* D.C. Code § 2-561.

Ex. 19 (Rule Transmittal Forms).[26] The permanent rule, subject to notice-and-comment rulemaking, was enacted on June 30, 2017. *See* 64 D.C. Reg. 006105-06 (June 30, 2017).

b. The process followed by the District to adopt the Emergency Rule was adequate.

"In construing a statute, we begin by examining its language; and 'if the words are clear and unambiguous, we must give effect to its plain meaning.'" *Leonard v. District of Columbia*, 801 A.2d 82, 84 (D.C. 2002) (quoting *James Parreco & Son v. D.C. Rental Hous. Comm'n*, 567 A.2d 43, 45 (D.C. 1989)); *see also Pub. Citizen, Inc. v. Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003) (looking to plain meaning of the word "issue" to determine whether an agency had issued a rule prior to its publication in the Federal Register). The plain meaning of "adopt" is "to accept formally and put into effect."[27] Although "adoption" signifies formal acceptance, it does not necessarily require a formal *process* to achieve the end goal.

The DCAPA is silent about how an emergency rule should be "adopted." *See* D.C. Code § 2-505(c). Moreover, the DCAPA does not require the District to establish specific procedures for the "adoption" of such rules. The provision of the DCAPA entitled "Establishment of Procedures" provides only that the Mayor and the Council "shall . . . establish or require each

---

[26] Both extensions of the Emergency Rule were adopted because of the on-going emergency presented by Lumen Eight's attempts to erect unpermitted signs in the District. *See* Pl. Opp., Ex. 3 (Kreiswirth Dep.) at 221:5-8, 228:1-4. Mr. Young signed a Rule Transmittal Form for the first extension, to which Mr. Kreiswirth added an effective date. *See id.* at 222:14-20, 223:20-22. The first extension was also reviewed for legal sufficiency. *See id.* at 225:2-5. The first extension was then published in the D.C. Register. *See* 63 D.C. Reg. 13718 (Nov. 4, 2016).

The second extension of the Emergency Rule was published in the D.C. Register on March 3, 2016. *See* 64 D.C. Reg. 2407 (Mar. 3, 2017). The published Notice of Emergency and Proposed Rulemaking for the second extension stated that the extension was adopted on March 4, 2017. *See id.* The District explained that the adoption date was a scrivener's error, and also should have been March 3, 2017. *See* Pl. Opp. at 27 n.24, Ex. 3 (Kreiswirth Dep.) at 221:10-231:21. A Rule Transmittal Form was created for the second extension of the Emergency Rule. *See id.*, Ex. 3 (Kreiswirth Dep.) at 230:6-20. Mr. Kreiswirth did not recall whether Mr. Young signed a transmittal form or whether a legal sufficiency review had been conducted for the second extension of the Emergency Rule. *See id.*, Ex. 3 (Kreiswirth Dep.) at 230:6-231:20. But Mr. Kreiswirth noted that the Emergency Rule was reapproved on March 4, 2017, on a Rule Transmittal Form signed by Mr. Young and containing the text of the Emergency Rule. *See* Pl. Opp., Ex. 19 (Rule Transmittal Forms).

[27] *See Adopt*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/adopt (last visited Oct. 4, 2019).

subordinate agency to establish procedures in accordance with this subchapter." *See id.* § 503(a). The DCAPA does not define "in accordance with," but the ordinary meaning of the term is "in a way that agrees with or follows."[28] Thus, the DCAPA's language is general, and leaves the District with ample discretion to determine whether to formalize the process that it employs to "adopt" rules under the DCAPA.

The record reflects that the District elected not to follow a pre-established process, but instead considered the Emergency Rule to be "adopted" once it (1) was approved by the City Administrator, (2) underwent legal sufficiency review by OAG, and then (3) had an effective date affixed to the Rule Transmittal Form. *See* Pl. Mot. at 19-21, Ex. 84 (Kreiswirth Dep.) at 116:2-117:6; Pl. SUMF ¶ 3; Def. Mot., Ex. 124 (Young Dep.) at 90:18-25; Pl. Opp. at 14-15. According to the District, these elements of adoption need not be met in any particular order or on any specified schedule. *See* Pl. Mot. at 19-20, Ex. 84 (Kreiswirth Dep.) at 116:2-117:6; Pl. SUMF ¶ 3; Def. Mot., Ex. 124 (Young Dep.) at 90:18-25.

Because the DCAPA does not require the government to establish organized procedures for "adopting" emergency rules, Lumen Eight's argument that the District violated the DCAPA by failing to adhere to such procedures must fail. Lumen Eight essentially contends that the government had an obligation to establish and follow pre-determined procedures, and that the District's failure to meet that obligation entitles Lumen Eight to the extreme remedy of invalidation of the Emergency Rule. *See* Def. Mot. at 27-29. This argument is precluded by the reasoning in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). *Norton* considered "what limits the [federal] APA places upon judicial review of agency inaction." *See* Norton, 542 U.S. at 61. Specifically, *Norton* considered whether the U.S. Bureau of Land

[28] *See In Accordance With*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/in%20accordance%20with (last visited Oct. 8, 2019).

Management ("BLM") could be compelled to enact land-use plans prohibiting off-road vehicles in "wilderness study areas." *See id.* at 57-61.

The federal APA allows a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," just like the DCAPA. *See* 5 U.S.C. § 706(1); *see also* D.C. Code § 2-510(a)(2) (allowing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"). *Norton* determined, however, that agency inaction is not judicially reviewable unless the agency has a discrete and mandatory obligation to act. *See Norton*, 542 U.S. at 65. "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law." *See id.* Thus, in *Norton,* because there was no statute or rule requiring BLM to prohibit off-road vehicles in wilderness study areas, BLM could not be judicially compelled to enact land-use plans to implement such a policy. *See id.* at 66-72.

The holding of *Norton* is instructive here. *See, e.g., District of Columbia v. Craig*, 930 A.2d 946, 967-68 (D.C. 2007) (noting that it is routine to rely on federal courts' interpretation of federal APA when construing analogous provisions of DCAPA). The DCAPA does not require the District to take any discrete or legally required action related to the adoption of emergency rules, and the Court therefore may not compel or review such action. *See* D.C. Code § 2-505(c). Lumen Eight's request that the Court invalidate the Emergency Rule is premised on the assumption that the District somehow violated the DCAPA by engaging in a haphazard rule-adoption process. Indeed, Lumen Eight implicitly asks this Court to require something more of the District when it "adopts" emergency rules. Because the Court reads *Norton* as precluding any such judicially-imposed requirement, Lumen Eight's argument must fail. Moreover, this conclusion is reinforced by the statutory presumption in favor of finding that the Rule was "duly adopted." *See* D.C. Code § 2-561.

Lumen Eight points to Mayor's Memorandum 2011-2 as an authority "establish[ing] a detailed process that must be followed when adopting emergency rulemakings." *See* Def. Mot. at 28; *see also* 58 D.C. Reg. 9086-87 (October 21, 2011) (Mayor's Memorandum 2011-2).[29] As an initial matter, because the City Administrator is not a subordinate agency and was acting as the Mayor's agent, the Memorandum does not appear to apply to him. *See* 58 D.C. Reg. 9086 (October 21, 2011) ("this memorandum updates the procedures to be followed by all executive agencies subordinate to the Mayor"); *see also* Mayor's Order 2015-036 (Jan. 9, 2015); Pl. RSUMF, Ex. 21 (Ensworth 30(b)(6) Dep.) at 70:8-22, Ex. 25 (Deposition of OPLA Director Maia Estes) at 170:5-171:5.

Even assuming that it does apply, the Mayor's Memorandum does not have the force or effect of law. "Agency protocols and procedures, like agency manuals, do not have the force or effect of a statute or an administrative regulation. Rather, they provide officials with guidance on how they should perform those duties which are mandated by statute or regulation." *See Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C. 1990); *see also Recio v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 134, 142 (D.C. 2013). Some cases provide for an exception to this general principle, which applies where a procedure impacts the rights of individuals. *See Mass. Fair Share v. Law Enf't Assistance Admin*., 758 F.2d 708, 712 (D.C. Cir. 1985). But that exception may not be invoked here, because the Memorandum is a purely internal, procedural

[29] The Mayor's Memorandum provides, in relevant part, "An agency must submit a transmittal memorandum with the proposed rulemaking. The transmittal memorandum shall: (1) state the purpose of the proposed rulemaking, (2) state the action requested, (3) provide background information on the proposed rulemaking, (4) the fiscal impact of the proposed rulemaking, (5) a statement of stakeholder impact, and (6) a proposed timeline for publication. The rules and memorandum should be submitted electronically to the Director of Office of Policy and Legislative Affairs and the agency's OPLA Policy Analyst for approval to submit to OAG. . . . Because an agency director's execution of an emergency rulemaking transmittal form technically promulgates the emergency rules (without the need for prior publication in the D.C. Register), the agency director should not sign an emergency rulemaking transmittal form until all approvals have been received. After all approvals are received, the agency director should execute the transmittal form and send it to the Deputy of OAG's Legal Counsel Division ('LCD Deputy'), who will execute and return it to the agency for its files." *See* 58 D.C. Reg. 9086-87 (October 21, 2011).

document that does not implicate the individual rights of any member of the public.[30] The Court therefore cannot compel compliance with the procedures laid out in the Memorandum.

Lumen Eight further argues that the Emergency Rule is invalid because the City Administrator did not personally undertake each of the steps required to effectuate the Rule's "adoption." *See* Def. Mot. at 23-29; Def. Opp. at 17-24. As previously discussed *supra* A.1.b, at 12-15, the official acts of the District are not properly attributed to a single person. Government officials may perform their duties in concert with other government employees. The cases cited by Lumen Eight are inapposite because they involve situations where the official who was authorized to act did not participate in the required action at all. *See* Def. Mot. at 23-29; Def. Opp. at 17-24.[31]

Finally, given the foregoing discussion, there is also no genuine dispute that the District validly adopted the Emergency Rule's extensions. District officials testified that the same

---

[30] The cases cited by Lumen Eight address internal procedures that directly affect individual rights, and thus are inapposite. *See* Def. Opp. at 28; Pl. Opp. at 18-19; *Junghans v. Dep't of Human Res.*, 287 A.2d 17 (D.C. 1972) (finding that the D.C.'s notice procedures were inadequate under the APA "[g]iven the consequences for the residents of the District that flow from the decision by the Council and the Commissioner to enact one of the several possible formulas for the payment of welfare assistance," because the procedures denied the public an opportunity to comment on the proposed change); *Mass. Fair Share*, 758 F.2d at 711-12 ("It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated. . . . The highly-refined procedures for treatment of applications for grants under the Urban Crime Prevention Program . . . command the same respect."); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224-225 (D.C. Cir. 1959) (finding that the FCC could not accept private, *ex parte* comments on distribution of television channel licenses, after its cut-off date for public comment, even though the FCC did not have a formal rule prohibiting that type of communications).

[31] In one case, *American Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8 (D.D.C. 2011), an Environmental Protection Agency official issued a rule after he had formally delegated the power to do so to another branch of the agency. *See id.* at 12. The court held that it could "uphold agency action only where the record establishes that the official who took such action was authorized to do so" because "once a regulation has been issued delegating power from one officer to a subordinate, the former may not thereafter invoke the delegated power himself." *See id.* at 13. *American Vanguard* therefore stands for the principle that an agency is bound by formal delegations of authority, not that officials are prohibited from relying on their staffs and other members of the government when enacting regulations. *See id.*

Lumen Eight also cites *Flav-O-Rich v. Nat'l Labor Relations Bd.*, 531 F.2d 358 (6th Cir. 1976), to support its position. *See* Def. Opp. at 23. In that case, the NLRB's decision to deny a petition for rehearing was reversed because the Board members had actually delegated the authority to deny a petition to staff lacking any formal decision-making power—no member of the NLRB was involved in the process. *See id.* at 363. Yet in holding that the Board's "delegation of decisional authority" was improper, the court explicitly mentioned that "members may, of course, continue to rely on their assistants for case summaries, legal memoranda, and draft opinions." *See id.*

process was followed for the two extensions as for the initial Emergency Rule. *See* Pl. Opp., Ex. 3 (Kreiswirth Dep.) at 221:10-231:21, Ex. 19 (Rule Transmittal Forms). The extensions were published in the Public Register on November 4, 2016, and March 3, 2017; and they therefore enjoy a rebuttable presumption that they were validly adopted. *See* 63 D.C. Reg. 13718 (Nov. 4, 2016); 64 D.C. Reg. 2407 (Mar. 3, 2017); D.C. Code § 2-561 ("The publication of any document in . . . the District of Columbia Register creates a rebuttable presumption: (1) That it was duly issued, prescribed, adopted, or enacted; and (2) That all requirements of [the DCAPA] have been complied with."). With respect to the extensions, Lumen Eight merely repeats similar arguments regarding the City Administrator's emergency rulemaking procedures. *See* Def. Mot. at 27; 63 D.C. Reg. 13718 (Nov. 4, 2016); 64 D.C. Reg. 2407 (Mar. 3, 2017). For all of the reasons previously discussed, the Court rejects Lumen Eight's challenge to the "adoption" of the Emergency Rule and its extensions.

3. *The Emergency Rule was published forthwith.*

The DCAPA provides that an "emergency rule shall forthwith be published" in the D.C. Register. *See* D.C. Code § 2-505(c). Forthwith means "within a reasonable time under the circumstances." *See Forthwith, Black's Law Dictionary* (10th ed. 2014); *see also* Def. Mot. at 33; Pl. Mot. at 41; *District of Columbia v. Howie*, 230 A.2d 715, 717-18 (D.C. 1967) (forthwith "means without unreasonable delay"). Lumen Eight argues that the Emergency Rule is invalid because it was not published in the D.C. Register "forthwith." *See* Def. Mot. at 33-34 (citing § 505(c)).

As discussed, the Emergency Rule was adopted on July 12, 2016. *See supra* A.2, at 21-30. Lumen Eight learned of the Rule's adoption eight days later, on July 20, 2016. *See* Pl. Mot., Ex. 49 (Lumen Eight's June 6, 2017, responses to interrogatories) No. 20. The Rule originally

was scheduled for publication in the D.C. Register on August 5, 2016. *See* Pl. SUMF ¶ 9; Pl. Mot., Ex. 51 (August 4, 2016, email from Mr. Kreiswirth, explaining that Mr. Young "would like to pull the Interior Signs rulemaking from publication in tomorrow's Register"), Ex. 84 (Kreiswirth Dep.) at 180:3-12. But before August 5, 2016, Lumen Eight requested that Mr. Young delay publication of the Rule so that Lumen Eight could meet with Mr. Young. *See* Pl. SUMF ¶¶ 10-11; Pl. Mot., Ex. 84 (Kreiswirth Dep.) at 180:10-12. Mr. Young acquiesced and stopped the scheduled publication of the Rule. *See* Pl. SUMF ¶¶ 10-11; Pl. Mot., Ex. 84 (Kreiswirth Dep.) at 180:10-12. Mr. Young, Mr. Kreiswirth, and representatives of Lumen Eight, including David Wilmot, met on August 9, 2016. *See* Pl. SUMF ¶ 12; Pl. Mot., Ex. 25 (Deposition of Lumen Eight) at 342:5-10. After the meeting, the Rule was again scheduled for publication in the D.C. Register. The Rule was published on August 26, 2016, 46 days after its adoption. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016).

Under the circumstances, the 46-day period between the Rule's adoption and its publication was reasonable. The record reflects that the amount of time that elapsed was not unusual -- emergency rules regularly are published more than 45 days after adoption. *See* Pl. Mot., Ex. 82 (list of emergency rules from 2011 to 2017 published in D.C. Register 45 days or more after effective date); Pl. Opp., Ex. 11 (other D.C. emergency rules). Further, the delay in this case was partially attributable to Lumen Eight's own request to put off the Rule's publication. *See* Pl. Mot., Ex. 25 (Lumen Eight Dep.) at 341:17-342:10, Ex. 84 (Kreiswirth Dep.) at 180:6-182:18, 188. If Lumen Eight had not made that request, the Emergency Rule would have been published on August 5, 2016. *See* Pl. SUMF ¶ 9; Pl. Mot., Ex. 51 (August 4, 2016, email from Mr. Kreiswirth), Ex. 84 (Kreiswirth Dep.) at 180:3-12. Lumen Eight may not claim that the 46-day delay was unreasonable under the circumstances, where Lumen Eight itself

was responsible for 21 days of that delay. Moreover, Lumen Eight had actual notice of the enactment of the Rule on July 20, 2016, and therefore was not prejudiced by the delay in publication -- *i.e.*, Lumen Eight did not rely on the publication of the Rule in order to receive notice of it.

4. *The City Administrator may amend the construction code with emergency rules.*

Lumen Eight argues that the Emergency Rule is invalid because its promulgation violated a statutory provision, D.C. Code § 6-1409(a), which mandates a "45-day period of review" by the City Council for any amendment to the Construction Codes of the District of Columbia. *See* Def. Mot. at 30-31. Section 6-1409(a) provides:

> All future amendments, supplements, and editions of the Construction Codes shall be adopted only upon authority of the government of the District of Columbia. The Mayor may issue proposed rules to amend the Construction Codes and to adopt new supplements and editions of the Model Codes in whole or in part pursuant to subchapter I of Chapter 5 of Title 2. The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part by resolution within this 45-day review period, the proposed rules shall be deemed approved. The rules shall not take effect until approved or deemed approved by the Council.

According to Lumen Eight, the Emergency Rule, which amends the Construction Codes, should have been submitted the D.C. Council for a 45-day period of review under the statute, during which the Council could have approved or disapproved the Rule. *See* Def. Mot. at 30-31. Lumen Eight asserts that § 1409(a) is the Mayor's substantive grant of authority to amend the Construction Code. *See District of Columbia v. Brookstowne Cmty. Dev. Co.*, 987 A.2d 442, 449 (D.C. 2010) ("Agencies are creatures of statute and their authority and discretion are limited to that which is granted under their founding statutes."); *see also* Def. Mot. at 30-31; D.C. Code §

6-1409(a). Thus, Lumen Eight concludes, the failure to follow the procedure outlined in the statute renders the Emergency Rule invalid. *See* Def. Mot. at 30-31.

The Court agrees that § 1409(a) grants the government substantive authority to alter the construction codes, including the Sign Code. The statute also unquestionably requires the Mayor to submit "proposed" rules modifying the Construction Codes to the Council for approval and adoption. *See* D.C. Code § 6-1409(a). But Lumen Eight errs in presuming that the "proposed rules" referenced in the statute include emergency rules that are promulgated under § 505(c) of the DCAPA. As previously noted, the normal process for agency rule-making includes "proposing" a rule by providing notice of it to the public, followed by a period during which interested parties may comment.[32] *See Wash. Gas Energy Servs. v. D.C. Pub. Serv. Comm'n*, 924 A.2d 296, 301-303 (D.C. 2007) (describing a rule promulgated under D.C. Code § 2-505(a) as a "proposed rule"); *Capital Auto Sales v. District of Columbia*, 1 A.3d 377, 380-81 (D.C. 2010) (distinguishing between emergency rules and "proposed permanent rule[s]" under § 2-505(a)). Section 505(c) of the DCAPA allows the government to enact an emergency rule "[n]otwithstanding" the ordinary requirements of notice-and-comment rule-making. *See* § 505(c) ("Notwithstanding any other provision of this section, if, in an emergency, as determined by the Mayor or an independent agency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately."); *see also Capital Auto*, 1 A.3d at 381 ("Emergency

[32] D.C. Code § 2-505(a) states in full: "The Mayor and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The notice shall also contain a citation to the legal authority under which the rule is being proposed. The publication or service required by this subsection of any notice shall be made not less than 30 days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Mayor or the agency upon good cause found and published with the notice."

and final rules must meet different demands to take effect"). In other words, when promulgating an emergency rule under §505(c), the government may bypass the normal process whereby it "proposes" the rule and solicits comments. In this Court's view, the best reading of § 6-1409(a) is that the 45-day review period applies to rules that are "proposed" and subject to notice-and-comment rulemaking, but does not apply to emergency rules, which need not be "proposed" to anyone. *See District of Columbia v. Am. Univ.*, 2 A.3d 175, 187 (D.C. 2010) ("statutory interpretation is a holistic endeavor; to the extent possible, we attempt to harmonize statutes, not read them in a way that makes them run headlong into one another"); *Thomas v. D.C. Dep't of Emp't Servs.*, 547 A.2d 1034, 1037 (D.C. 1988) ("A basic principle is that each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous.").

Lumen Eight's interpretation of § 6-1409(a) would preclude all emergency rule-making related to the Construction Codes. This is a drastic result that is not expressly required by the language of the statute. If the D.C. Council had intended to deny the Mayor the ability to respond to any and all construction-related emergencies, it surely would have stated its intent more clearly. In other parts of the D.C. Code, the Council has explicitly stated it when a statute precludes emergency rulemaking. *See, e.g.,* D.C. Code § 50-2301.05(a)(1) (2020) ("Notwithstanding § 2-505(c), the Mayor may not amend the schedule of fines until the Council has approved the proposed rules or the proposed rules have been deemed approved.").[33] Because

[33] Other sections of the D.C. Code expressly authorize emergency rulemaking where prior subsections refer to "proposed rules," thereby clarifying that proposed rules and emergency rules are distinct. For example, the rulemaking provision of the D.C. Consumer Credit Organization statute, D.C. Code § 28-4608 (2020), states in subsection (a) that: "proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess;" and then in subsection (c) that: the "Mayor may issue emergency rules without prior Council approval." *See* D.C. Code § 28-4608(a), (c); *see also* § 31-3710(a), (b) (providing that "proposed rules shall be submitted to the Council for a 45-day period of review," but that "[t]he Mayor may issue emergency rules without prior Council approval"); § 28-4527 (same); § 42-3610 (same); § 44-213 (providing that the Mayor may issue both "proposed" and "emergency" rules under statute regulating clinical

§ 6-1409(a) is a general grant of authority to amend the construction code that does not apply to the promulgation of emergency rules, the Emergency Rule did not require the Council's approval before becoming effective.

5. *Successive emergency rules are permissible.*

As noted, the District enacted the Emergency Rule on August 26, 2016, for 120 days, and thereafter extended the Rule for two more 120-day periods. *See* 63 D.C. Reg. 11000 (Aug. 26, 2016); 63 D.C. Reg. 13718 (Nov. 4, 2016); 64 D.C. Reg. 2407 (Mar. 3, 2017). Lumen Eight argues that the Emergency Rule's extensions are invalid because they violate D.C. Code § 2-505(c)'s limitation of emergency rules to a single 120-day period. *See* Def. Mot. at 20-21. Yet Lumen Eight fails to point to any authority that prohibits successive emergency rulemakings under § 505(c). The Court is unaware of any such prohibition. *See* § 505(c); 1 DCMR § 311.4.

Lumen Eight instead relies on *District of Columbia v. Washington Home Ownership Council*, 415 A.2d 1349, 1352 (D.C. 1980), which addressed the D.C. City Council's ability to pass successive emergency legislation under the Home Rule Act. *See* Def. Mot. at 18-19. The Home Rule Act is a statutory scheme balancing congressional oversight with the D.C. Council's local legislative authority. *See* D.C. Code § 1-201.01, *et seq.* (2020). The Court of Appeals's extensive discussion of the Home Rule Act's legislative history in *Washington Home Ownership Council* demonstrates that the Home Rule Act implicates very different policy considerations from those raised by an agency's ability to address emergencies under the DCAPA. *See Washington Home Ownership Council*, 415 A.2d at 1352. *Washington Home Ownership Council* is simply inapposite here.

---

laboratories); *see also* § 28-4202 (providing that "[t]he Mayor may issue rules to implement this chapter," and then that "the Mayor may issue emergency rules").

B. Lumen Eight has no vested right to install its signs under the Legacy Regulation.

Lumen Eight concedes that the signs that are the subject of this litigation all require permits under the Emergency Rule. *See generally* Def. Responses to Pl. Requests for Admissions (July 25, 2018); *see also* Dec. 4 Transcript; 12-A DCMR § N101.3.5.3. Lumen Eight argues, however, that it nevertheless should be permitted to install some of its signs under the Legacy Regulation and a theory of equitable vesting. *See* Def. Mot. at 45-50. The District responds that the doctrine of equitable vesting does not apply, and in any event, "Lumen Eight lacks the clean hands that the equitable relief it seeks requires." *See* Pl. Opp. at 36-37. The Court finds that Lumen Eight is not entitled to equitable relief.[34]

"A vested right must be more than a mere expectation based on the anticipated application of existing law." *See Scholtz P'ship v. D.C. Rental Accommodations Comm.*, 427 A.2d 905, 918 (D.C. 1981); *Washington v. Guest Servs.*, 718 A.2d 1071, 1078 (D.C. 1998) ("Plausibility is not enough . . . to create the kind of vested right that a court should take care not to impair."). As this Court has previously ruled, under traditional applications of vesting and zoning law, Lumen Eight's "interest in erecting signs would have vested when [Lumen Eight], in fact, installed the signs in reliance on" the Legacy Regulation. *See* Dec. 4 Transcript at 12:14-17. Because the District adopted the Emergency Rule before Lumen Eight installed the signs in question, Lumen Eight never gained a vested right to put up its signs. *See id.*; *see also* Def. Response to Pl. Supp. Brief in Opp. to Pl. Mot. to Dissolve Prelim. Injunction, at 19 (January 15, 2019) ("[W]hether Lumen Eight's rights vested turns on when its signs were installed").

Lumen Eight relies on *Speyer v. Barry*, 588 A.2d 1147 (D.C. 1991), to argue that it is entitled to an equitable exception to the vesting doctrine. *See* Def. Mot. at 45-50. In *Speyer*, the

[34] Because the Court finds that Lumen Eight is not entitled to equitable relief, the Court need not resolve the parties' dispute about whether or not Lumen Eight's exterior signs were exempt from permitting requirements under the Legacy Regulation.

District of Columbia had purchased property in an area zoned only for residential use, planning to use it as a treatment center for children with "emotional problems." *See Speyer*, 588 A.2d at 1149, 1151. At the time the District purchased the property, the District was exempt from the applicable zoning restrictions. *See id.* at 1151-52. The District therefore never obtained a zoning variance to operate the treatment facility from the D.C. Board of Zoning Adjustment. *See id*. Before the property was completely renovated and operating as a treatment facility, however, the D.C. Council enacted legislation requiring the District to comply with the applicable zoning regulations. *See id.* at 1153.

The Court of Appeals remanded the issue of whether the District government had a vested right to a nonconforming use of property under the newly enacted zoning laws, even without a zoning variance. *See Speyer*, 588 A.2d at 1156. In doing so, the court discussed the revelant considerations for determining whether the District had such a vested right. *See id.* at 1153-56. As an initial matter, *Speyer* reiterated the principle that intention is not sufficient to establish a vested right. *See id.* at 1154; *see also Watergate E. Comm. Against Hotel Conversion to Co-Op Apartments. v. D.C. Zoning Comm'n*, 953 A.2d 1036, 1046 (D.C. 2008) ("There is no vested right in zoning classifications.") (quoting *Foggy Bottom Ass'n v. D.C. Zoning Comm'n*, 639 A.2d 578, 583 (D.C. 1994)). The court opined, however, that the government could have acquired a vested right to use the property for its desired purpose if the government had "in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or . . . incurred substantial obligations" in reliance on the previous zoning rules. *See Speyer*, 588 A.2d at 1154.

Citing *Speyer*, Lumen Eight argues that it created a vested interest in installing its signs when it entered leases to obtain space for the signs; purchased the signs; entered into a

Management Services Agreement with DOMI to manage Lumen Eight and its signs; and obtained bracket and electrical permits. *See* Def. Mot. at 49. According to Lumen Eight, it has produced evidence of substantial obligations, expenditures, and a change in position that are sufficient to support its claim of a vested interest. *See* Def. Mot. at 49.[35]

Lumen Eight's "'hurried incurring of expenditures . . .' d[oes] not 'commend itself to any equitable consideration'" because it knew that its signs were likely to be challenged. *See Speyer*, 588 A.2d at 1156 n.19 (quoting *Graham Corp. v. Bd. of Zoning App.*, 97 A.2d 564, 566-67 (1953)). *Speyer* specifically noted that if the D.C. government was aware that its plans would conflict with proposed or enacted zoning laws, but "attempted without adequate justification to present the court and the community with a *fait accompli*, this would severely undercut the District's claim" to equitable relief. *See id.* at 1156. Here, Lumen Eight knew that its plan to erect unpermitted signs might violate an applicable regulation, but Lumen Eight attempted to present the District with a "*fait accompli*" hoping that the signs would be "grandfathered" under the company's own interpretation of the Legacy Regulation. Lumen Eight considered the possibility that the District might bring an enforcement action against it, and even that the District might pass emergency legislation to block the company's plans. *See* Pl. Mot., Ex. 18 (memorandum explaining that outdoor advertising is heavily regulated in D.C.), Ex. 19 (email sending Exhibits 18 and 20 to Mr. MacCord), Ex. 20 (memorandum explaining that Lumen Eight's signs may be "subject to permitting and regulation," and that the District could respond

[35] As an initial matter, Lumen Eight itself has previously conceded that "the brackets and electrical permits are irrelevant to whether Lumen Eight's signs are vested." *See* Def. Response to Pl. Supp. Brief in Opp. to Pl. Mot. to Dissolve Prelim. Injunction at 19, filed January 15, 2019. Lumen Eight did not hold most of those permits; instead, the permits were issued to the owners and occupants of the properties that Lumen Eight leased. *See* Dec. 4 Transcript at 12:7-13; Pl. Mot., Ex. 33 (October 21, 2014, email from Lumen Eight employee Greg Miller to Colin Stewart and Mr. MacCord) ("When submitting as to who permits are for: Owner of Building and the Registered Agent will be whoever the permit expediter is," not Lumen Eight). Moreover, the permits did not mention the installation of digital signs. *See* Pl. Mot., Ex. 29 (Permits); Pl. SUMF ¶ 79 ("Lumen Eight did not obtain permits for its signs."); Def. RSUMF ¶ 79. Thus, DCRA's issuance of bracket permits and electrical permits does not support Lumen Eight's claim.

to its signs with emergency legislation), Ex. 21 (lease agreement between Lumen Eight and property owner providing right to terminate lease if D.C. regulations changed), Ex. 103 (Deposition of Lumen Eight employee Digby Beaumont) at 90:8-9 ("We thought there was a chance" of litigation). Yet instead of disclosing its plans to DCRA or seeking approval from enforcement officials, Lumen Eight chose to "fly under the radar," in an attempt to establish vested rights before the District caught on to Lumen Eight's activities. *See* Pl. Mot., Ex. 26 (September 5, 2014 email from Mr. MacCord) ("there are the drawings we present to the city to obtain permits and fly underneath the radar as much as possible"), Ex. 20 (memorandum advising Lumen Eight on how to delay the District's rulemaking process), Ex. 30 (September 11, 2014, email from Mr. MacCord) ("The whole idea of the drawing [submitted to D.C.] being generic is to keep what we are doing quiet"), Ex. 33 (October 21, 2014, email from Mr. Miller) ("This will keep us flying under the radar as we move along"), Ex. 58 (August 22, 2016, email from Mr. MacCord) ("Ignore [stop work order] and get it up. Do everything after hours"). The record is thus replete with evidence that "the difficulty in which the [defendant] finds itself on this matter of expense was one of its own deliberate choice." *See Speyer*, 588 A.2d at 1156 n.19 (quoting *Graham Corp.*, 97 A.2d at 566-67). Lumen Eight's calculated plan to present the District with a "*fait accompli*" bars the company from obtaining equitable relief. *See id.* at 1156.

Because Lumen Eight's signs require permits under the new Sign Code and its right to erect those signs did not vest before the Emergency Rule was enacted, Lumen Eight may not erect its signs in the District of Columbia without obtaining sign permits.

Accordingly, this 9th day of March, 2020, it is hereby

ORDERED that plaintiff District of Columbia's Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that the case is closed and all further court dates are vacated.

SO ORDERED.

Judge Florence Y. Pan
Superior Court of the District of Columbia

Copies to:

Eric U. Johnson, Esq.
Fernando Rivero, Esq.
Tony M. Jackson, Esq.
Eric S. Glover, Esq.
Christopher Sousa, Esq.
Jennifer Krupke, Esq.
Counsel for Plaintiff District of Columbia

Steven A. Cash, Esq.
Adam Grant, Esq.
Counsel for Defendant Lumen Eight Media Group, LLC

Philip T. Evans, Esq.
Jessica L. Farmer, Esq.
Rachel E. Mueller, Esq.
Cynthia A. Gierhart, Esq.
Counsel for Defendants
CLPF-CC Pavilion, Jamal's Darth Vader LLC,
Douglas Development Corp.,
NH Street Partners Holding LLC, and
Western Washington D.C. Corporate Center